
# Negotiation Behaviors and Styles, their effectiveness and their applicability in commercial Mediation

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I hereby declare that the work submitted is mine and that where I have made use of another's work; I have attributed the sources according to the Regulations set in the Student's Handbook.

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# Abstract

This dissertation was written as part of the MSc in L.L.M. in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

In this thesis I have described the styles, behaviors and stages of negotiations and reviewed some of the most important multidisciplinary works written on the subject. I started with the popular aggressive style of negotiation, pointed out its disadvantages and continued to the most recent theories of integrative negotiation and explained the many advantages. I have presented empirical studies that measure the effectiveness of negotiation styles and demonstrated that the cooperative negotiation techniques are more effective than the adversarial ones. After presenting an inventory of what is known so far, I have drawn conclusions that are applicable to any person trying to negotiate and settle a dispute. I supported that the cooperative and competitive approaches should coexist, as there is a phase to create value and a phase to claim value in each negotiation, irrelevant of the subject matter of dispute. I also displayed the advantages of mediation, questioned the suitability of the integrative approach in the current one-day model of commercial mediation and proposed ways to resolve this issue. Finally, I addressed the problem the legal community has created by treating mediation as a step within litigation instead of a dynamic ADR mechanism and supported that further research needs to be made in this area.



I want to express my deepest gratitude for the International Hellenic University for giving me this opportunity to be a part of an excellent Masters' program in English in my home country. The teaching level, the organizational structure, the ongoing assessment of the faculty and the aim for continuous improvement are some of the things that made a great impression. It was a great experience and I have grown a lot in many different ways during my studies. Special thanks to my supervising professor Dr.Komnios Komninos for his guidance and support during this difficult time of searching, reading and writing my dissertation and to author Carrie Menkel-Meadow, whose books provided me the most structured guide, helped me select carefully my sources and advanced my thinking. Also, I

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*Keywords: Negotiation, Mediation, Styles, Effectiveness, Behavior*

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# Preface

I was inspired to write about this topic in my dissertation because negotiation is part of our daily life. As I am currently working in sales and with my finance background, I find it very important to become a good negotiator and to be able to get what I want while at the same time maintaining a good relationship with my client. I wanted to explore the theoretical background, study cases and examples and read about practical advices from exerts and pioneers in this field. Also, it was intriguing for me to work on a subject that concerns both the economic and legal community and combines the two sciences. Mediation and ADR mechanisms were my favorite classes in this masters' degree and wanted to investigate this subject in more depth as well.

In the first chapter of the thesis I describe the theoretical background of the competitive approach and also analyze the cooperative. I explain based on the works of many authors the characteristics and behaviors of each. In the second chapter I present research studies that show the superiority in effectiveness of the distributive approach of negotiation and in the next chapter I suggest ways to negotiate and reach an amicable settlement. In the final chapter prior to the conclusions, I describe the characteristics of mediation, its many advantages and question whether the current model of mediation is promoting the integrative approach of negotiation.

# Contents

# Introduction

Negotiation is an explicit part of our life. Whether we realize it or not we negotiate daily informally for personal issues with the members of our family or friends or formally for business purposes with co-workers, supervisors, suppliers, clients etc.. Negotiation also takes many forms (face to face or from a distance) and it occurs in different environments (legal proceedings, sales, government conferences). We negotiate for simple and trivial matters to very complex and critical issues. We do so to accomplish certain goals, to resolve conflicts and to achieve our objectives. The modern reality nowadays along with the fast pace of the economic growth and the expansion of the commercial transactions worldwide, has urged the scientific community to develop negotiation theories and to study this area in detail. Negotiation has been studied from various contexts (real and simulated) and from various fields. Psychologists, political and decision scientists, economists, game theorists, anthropologists and lawyers have all contributed with their work to our current knowledge of negotiation. It is a fact that most of the political, social and economic part of life is negotiated and conflict resolution is a growing industry.

There is a plethora of books about negotiation and still new theoretical works are written, new case studies are being produced, new research has been undertaken. In the last fifteen years, the field of negotiation has grown rapidly. Negotiation is being taught as a separate course in many universities globally from specialized personnel and skilled negotiators are highly requested in the corporate world. One of the reasons for the huge interest in the field of negotiation, was to analyze and understand it, then to be able to teach it to others and create guidelines and how to do it better manuals. Another important reason was in the 1980's when there was a growing discontent from lawyers about how legal disputes were resolved (traditionally with the adversary process) and also from the parties about the unsatisfactory and inefficient outcomes produced. Being concerned about the quality of agreements generated, people sought to understand negotiation, its styles, strategies, behaviors and types. They also began the search for new ways to resolve conflict and deal with disputes.

Over the study of works about negotiation, we find out that the whole literature is divided –polarized in two main approaches. Different authors have used different names for these two general types of negotiation, but the essence remains the same. On the one hand we have the competitive or adversarial books, such as Bellow and Moulton's (1981) "The Lawyering Process: Negotiation", Cohen's (1980) "You Can Negotiate Anything: How to Get What You Want", Edward's and White's (1977) "The Lawyer as a Negotiator: Problems, Readings and Materials" and Gulliver's (1979) "Disputes and Negotiations: A Cross-cultural Perspective", where we are told how to gain advantage and win at any cost and how to deal with opposite positions. Other names for this approach have been used through the literature such as distributive bargaining, positional bargaining, hard negotiations or zero-sum games. On the other hand we have the integrative bargaining (Pruitt 1981 and Raiffa 1982), the cooperative bargaining (Williams 1983), the principled negotiation (Fisher and Ury 1981), the solution devising (Zartman and Berman 1982), the problem solving, interest based or win-win negotiations, where the authors search for mutually satisfying, creative solutions and meeting the parties' underlying interests rather than winning.

In this paper, I will analyze the styles and behaviors used in negotiation, look at empirical studies that measure their effectiveness and extract conclusions that will be helpful to any person in a legal dispute or disagreement. Also, I am interested in how these conclusions can be applied in commercial mediation and whether the existing models used in commercial mediation are suited to their implementation. In other words, I will illuminate what we know so far from the existing literature (legal and not) on the subject of negotiation, explore what issues are left uncovered and criticize some omissions or wrongdoings.

# 1. Styles and Behaviors of Negotiation

Before carrying on let us first define the word negotiation. Then we will analyze the two main approaches of negotiation, the competitive and the integrative.

## 1.1 Definition of Negotiation

The word negotiation comes from the Latin word “negociacion” or “negotiationem”. We first encounter it in the early 15th century where it had the meaning of “business, trade, traffic”. Over the years the meaning of the word evolved to being the act of dealing with another person until it became today’s dictionary description of dialogue or discussion between two or more people who aim to reach an agreement over one or more issues in dispute. Thus, negotiation is usually a voluntary process of turning different positions into an agreement and resolving a difference.

Most negotiation theories define negotiation as a process; the difference in each definition lies in the description of the process. Below are the definitions from most of the authors we are going to examine in this thesis. According to Bellow and Moulton (1981) (p.11), negotiation is “a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests and it is accomplished consensually as contrasted with the force of law.” Cohen (1980) (p.15) states that negotiation is “a field of knowledge and endeavor that focuses on gaining the favor of people from whom we want things.” On the other hand, Fisher and Ury (1981) (p.xi) describe negotiation as “a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.” Gulliver (1979) (at xiii) is at the same wave with Fisher and Ury and defines negotiation as “an one kind of problem-solving process-one in which people attempt to reach a joint decision on matters of common concern in situations where they are in disagreement and conflict.” Raiffa (1982) (p.7) writes negotiation is “concerned with situations in which two or more parties recognize that differences of interest and values exist and in which they want or are compelled to seek a compromise agreement” and Pruitt (p.1) quotes negotiation as “a process by which a joint decision is made by two or more parties, where the parties first verbalize contradictory

demands and then move toward agreement by a process of concession making or search for new alternatives." Finally, Zartman and Berman (1982) (p.1) define negotiation as "a process in which divergent values are combined into an agreed decision" and Menkel-Meadow (1983) states that "we negotiate whenever we want something from somebody." From the definition each author gives about negotiation, we understand their own perspective and approach on the matter.

At this point, I will describe the approaches of the most leading authors and present a brief summary of their work to create an inventory of what is known so far. We will see the transition from the purely competitive books where deceitful techniques to win are promoted to the most recent cooperative theories, authors and empirical studies. I will start chronologically and move on to the most recent books and articles. Firstly we will analyze the dual concerns model, which is a matter of discussion and research from many academics.

**1.2 Dual Concerns Model**

Blake and Mouton (1964, 1970), based on the assumption that people in conflict have two basic concerns about their own outcomes and about the counterparty's outcomes, came up with a two-dimensional model for managing conflict, called "dual concerns model". On the vertical dimension they placed the party's concerns about itself (often referred to as assertiveness) and on the horizontal dimension the concerns about the other party's goals being achieved (also known as cooperativeness). Although in the two- dimensional diagram there is theoretically an infinite number of possible points –outcomes, five styles of managing interpersonal conflict have been introduced in the dual concerns model: "the competing, the collaborating, the compromising, the avoiding and the accommodating". The stronger the concern a party has about their own outcomes, the more likely the style of negotiation is on the upper part of the model and the more a party cares about the outcome of the counterparty, the more chance there is that the style is on the right side of the diagram. Below is a brief analysis of how each style handles conflict with emphasis given on the positive and negative characteristics of each.

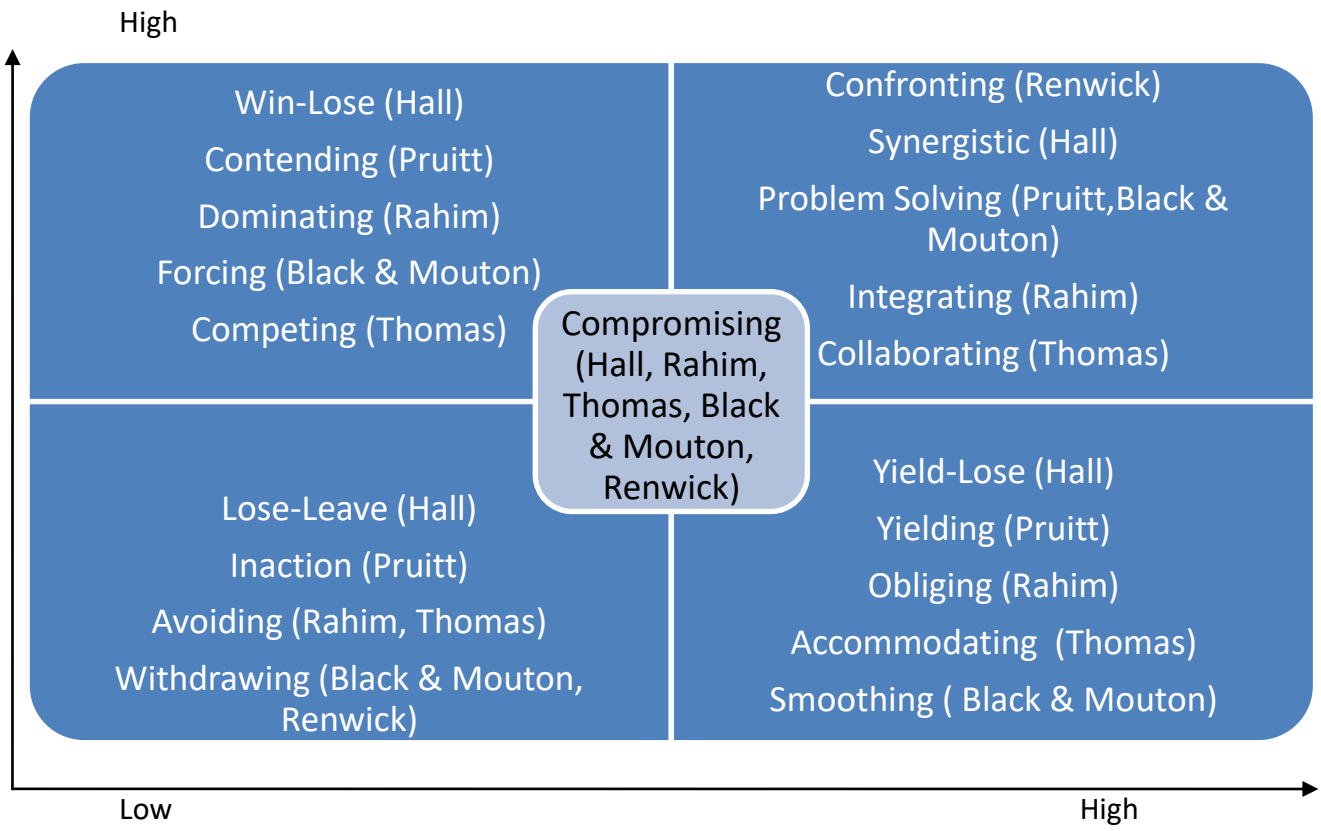
**Concern for Production (Black & Mouton, 1964)**

**Concern for Personal Goals (Hall,1969 ; Renwick 1977)**

**Concern for Self (Rahim, 1983)**

**Concern about Own Outcomes (Pruitt, 1986)**

**Assertiveness**




**Cooperativeness**

**Concern for Relationships (Hall,1969,;Renwick, 1977)**

**Concern about Other's Outcomes (Pruitt, 1986)**

**Concern for Others ( Rahim, 1983)**

**Concern for People ( Black & Mouton, 1964)**

**Party's Desire to Satisfy Other's Concern (Thomas, 1992)**

*Picture 1.0: Dual Concerns Model (adapted from Thomas 1992; Rahim 1983; Blake & Mouton 1964, 1970; Pruitt 1986)*

- *Competing (also called dominating or contending)* is an aggressive and strategic means of dealing with conflict where a party tries to force a solution on the other party and persuade them to yield to his view. Negotiation is seen as a win-lose situation and tactics to intimidate the other party (such as threats, insults, psychological warfare, personal attacks) are often used. Consistent with this style is the high concern of a party for his own goals to be accomplished and little care about the counterparty's outcomes. This style doesn't pay attention to the relationship between the parties and is not concerned with the damage caused on the relationship. Usually a party employs this style of negotiation when the issue of dispute is trivial, or of major importance to them and an unfavorable result would be very costly. Also, the competing style may be used when the parties are of unequal strength (power) or a speedy decision is needed. We understand that for complex matters with many variables at the table, it would be more difficult to implement such a negotiation style but for a simple dispute such as a price of a product, it is easier to enforce. A deadlock may occur in cases where both parties use this technique, thus leading to a hostile relationship between the parties and eventually to not reaching a settlement.

- *Collaborating (also named Integrating or problem solving)* is an approach that seeks for both parties goals to be achieved. The party pursuing this style of conflict management considers maximizing its own outcomes but also cares for the counterparties' needs to be met at the same time. The logic to make this happen is to create value by expanding the pie of possible solutions, brainstorming to find the optimal agreement where everyone is satisfied, identifying the underlying interests to the dispute and generally working together with the other party to solve tough problems creatively. It is only logical that such a style of negotiation is time consuming and exhausting at times, as it requires a lot of preparation in advance. It is encouraged by supporters of the "principled negotiation" theory and it helps form strong bonds with the other side and enhances the relationship dynamic. It is usually used to battle complex problems, when time is not pressing. Some concerns a collaborating party should be careful so as to avoid being taken advantage of, are the

problem of information sharing between the parties (openness of communication) and his attitude if the other party is not interested in a win-win solution.

- *Compromising* is the style where both parties to the dispute make concessions from their initial positions and usually meet in the middle. In other words, it is a give and take approach. There is no clear winner, nor the best result for either party is accomplished, but a fair outcome for both parties is achieved and the relationship between them is preserved and kept strong. It is the preferred choice when the goals of one party are mutually exclusive of the goals of the other party and the parties are of equal power or even when the integrating and the competing style have not been tried and not been successful in resolving the conflict. Also, it is a useful strategy when a solution to a complex problem is needed or there is limited time to complete a deal. Sometimes compromising negotiators unnecessarily rush the process and make concessions too fast from their eagerness to close the deal. Pruitt and Rubin (1986) don't consider compromising as a separate style. They argue that it falls either in the problem-solving approach as a "lazy and half- hearted attempt to satisfy both parties" or simply in the yielding approach.

- *Avoiding (also known as inaction)* is when no real negotiation takes place as one party evades the confrontation. This is because one party is not concerned about its own goals being satisfied and neither about the other party obtaining their own outcomes. This style is characterized as withdrawal and is a passive aggressive technique of resolving conflict. It is demonstrated by silence, or inaction by one party, which usually results in a deadlock of the negotiation process, resentment feelings, tension from the counterparty and generally strained relationships. The party, which wants to avoid emotions and dealing head on with an issue, can sometimes be accused as being dishonest or having things to hide from the other side. It is used most often when a negotiation is simple, or for a trivial or not urgent matter and there is no rush to be resolved immediately. Another reason for a party to maintain this attitude is when a cooling off period is needed in the midst of the negotiation. Sometimes a party who doesn't trust itself to negotiate a deal well and wants to escape making concessions, simply decides to avoid the situation all

together, since the benefit of having a resolution is outweighed from the dysfunctional confrontation. Finally, if a party believes they are being treated unfairly, need time to prepare or think that it is pointless to negotiate; it may find it appropriate to handle conflict using this style.

- *Accommodating (also known as yielding or obliging)* is a submissive style of managing conflict. Yielding involves letting the other party win and gain what they want from the negotiation. Parties pursuing this strategy have little interest in their own goals and are neglectful of their own outcome. They care about the other parties' needs to be met and put the relationship between them as top priority. For this reason, they make concessions, give in to demands and are open to sharing information. It is considered as a passive approach towards conflict. It is usually used when a party realizes their position is wrong and agrees with the arguments of the other party or when a party will give in now for something in exchange from the other party in the future. Also, negotiators tend to use this style when maintaining or mending the relationship with the other party is very important or even when a party is dealing from a point of weakness. It can be potentially hazardous for a party if the other side is negotiating in a competitive way and lead to a less than ideal outcome.

The dual concerns model has several variations. It was the basis for the emerge of many theoretical approaches dealing with styles and modes of conflict (Pruitt and Rubin, 1986; Rahim, 1992; Thomas, 1992) and also of empirical research which evaluated these styles (Rahim, 1983). Although all five approaches have been identified, problem-solving has been suggested as the preferred one and suitable for almost any negotiation. Most recent studies show that each style has its own advantages and disadvantages and although problem-solving is the most favorable choice, other factors such as the context of conflict, style of the other party's negotiator and type of interdependence between the parties, must be carefully considered.

The dual-concern model has received two criticisms, one that it fails to clarify how and why people change their strategy from one style to the other in the middle of the negotiation and it only indicates the style a negotiator prefers. In practice, negotiators often switch and have to adapt to the style of the counterparty, keeping aside their preferences.

The second criticism is that it is not a theory of strategic choice and many relevant topics are left uncovered.

### 1.3 Treating negotiation as a competition to win

Moving on to competitive authors, we look at Edwards and White (1977) book **"**The Lawyer as a Negotiator". There, they present cases, readings and problems related to negotiation, emphasizing on court proceedings and how to gain the most profit to fulfill their clients' interests. They give specific advices on how to beat the other party who is seen as an opponent after the same gains. For example they explain how to learn the counterparty's settling point but not to reveal your own (p. 112-120) and how to deal with more powerful negotiators (p.133-141).

Also, in their book they present the popular article "Negotiating Tactics for Legal Services Lawyers" written by Meltsner and Schrag (1973). The later authors present a list of deceitful, unethical and manipulative tactics that a lawyer should follow when negotiating, in order to be successful. They mention that all these tactics are not appropriate for all negotiation types as it depends on the relative strengths of the parties, the issue of dispute of each case and the likeliness of dealing again with the same party. They strongly believe that the party who desires more to negotiate is in a disadvantage and as a result is less powerful. They divide their negotiation tactics to four categories. First, come the preparatory tactics such as to "arrange to negotiate on your own turf, or to "outnumber the other side", to stall if the counterparty is in a hurry and "lock yourself in" and be thoroughly prepared. All these aim to make the one party feel confident, comfortable, in control of the discussion and the other party insecure and eager to settle. Then, come the initial and the general tactics that can be used during the negotiation such as to force the counterparty to make the first offer or the first concession, to make extremely high demands, to use the good cup/bad cup strategy, to "appear irrational" if it is helpful, to "raise demands" after a point is settled and generally to "be tough". Last come the post- negotiation tactics where the aim is to ensure that the other party doesn't feel cheated and to ensure the agreement is properly written down. Hoffman (2003) draws the conclusion that when two parties are willing to exploit each other and make use of unfair techniques, then success lies to the one who uses these tactics more effectively.

Another book supporting the adversarial approach to negotiation was written by Bellow and Moulton (1981) with the title “The Lawyering Process: Negotiation” as a legal textbook for law students. The authors were from the first to analyze lawyers’ behavior and to combine theory with practical cases. As far as the negotiation is concerned, they considered it to be a zero-sum game where the goal is to maximize the gain for your client and to get the counterparty to give up as much as possible. Negotiation is seen as a way to save money and time that would be spent on court proceedings (p.50) and the target is to mislead the adversary with various maneuvers into yielding and reaching an agreement as close to his bottom line as possible (p.58-63). To that end, the authors suggest strategies such as avoiding replying to questions about yourself, pushing the other party to answer, making repeated demands and counter-demands, controlling agendas (p.87-108) and a list of complicated techniques to increase your bargaining influence. Also, they examine the effectiveness of promises, threats, concessions and leverage (p.119-146), so as to dominate a competitive negotiation process.

Next we have the book of Cohen (1980) “You Can Negotiate Anything: How to Get What You Want”, which was written as a how to do it manual for a lay audience. The author supports that there are three main elements that influence the success of negotiations: time (time constraints and deadlines put pressure to conclude an agreement fast, patience is the key), information (knowledge of underlying interests, needs and goals of the other side, being prepared) and power (based on expertise, precedence, persistence, attitude or ability of persuasion). Cohen (1980) gives many examples of failed and also successful negotiations and presents case studies to demonstrate how to use these elements to get an advantage. He also introduces two styles of negotiation, the “Soviet style” and the win-win approach and points out that a good negotiator should be aware of both. The “Soviet style” includes high starting offers, very small concessions by usually unauthorized negotiators until the other side is tired and less resistant (win-lose approach). In win-win situations trust needs to be established, parties need to work towards cooperation by focusing on both their needs and creating a joint solution. Further on he proposes deceitful techniques to take advantage of the other party and accomplish your own goals such as playing dumb to get information, asking “what if” to reduce a price or cost, being awkwardly silent, trying to cause sympathy to the other side, demanding something new at the end of the bargains (sunk cost),

detachment from personal emotions. Cohen (1980) sees negotiation as a game that you have to participate in, so as to achieve a good result either by building trust which takes time or by competing to get the larger share. Otherwise he points out that you will get only what is given to you. While he presents ways to built a trustful environment and achieve a win-win outcome, he support that a win-win situation is possible only if both parties cooperate (p.112 & chapters 9, 10).

### 1.4 Negotiation theories from other disciplines

Pruitt (1981) from a social psychology point of view, Zartman and Berman (1982) from an international relations field and Gulliver (1979) as a cross-cultural study, all describe negotiation in a non-legal context as we will see below. Their contribution to the development of negotiation theory is undeniable.

Gulliver (1979) in his book "Disputes and Negotiations: A Cross-cultural Perspective" explores the common structures and processes that occur in all negotiations and aims to create a general theory of negotiation stages regardless the culture and subject matter of dispute. He reviews labor negotiations and cross-cultural studies to form his conclusions (chapter 2). The most important piece of information to take out of Gulliver's book is his cyclical and developmental model. In the cyclical model the negotiator develops his own set of preferences and tries to find out about the counterparty's preferences. Much like the choices Pruitt suggested, the negotiator at this point has the option to yield or compete to maximize his gain. The parties share information and learn to change their positions and desires to arrive to an agreement. The developmental model on the other hand, has a transposition from the stage of conflict to the final stage of agreement. The concept is that all negotiations start from a competitive stage and become cooperative in the end .Thus, agreement and disagreement changes back and forth in a dynamic procedure and if the negotiation is successful, a solution is produced (chapter 6). In developmental model, the author divides negotiation in eight stages: "search for arena, definition of the agenda, exploring the field, narrowing the differences, preliminaries to final bargaining, final bargaining, reutilization and execution of the outcome" (p.122) and explains the operations of each stage in different contexts. Gulliver (1979) comes to the conclusion that negotiation

is not the unstructured, informal and unformed process that most theorists believe but it has distinctive stages, which enables us to form rules to govern the whole process.

Pruitt (1981) in his book “Negotiation Behavior” presents a synthesis of the state of art of negotiation theories and gives examples from various fields. He devotes a lot of attention to the perceptions, motives and processes which lie under the behavior of negotiators and to laboratory results from experiments on negotiation. Most of his empirical work lacks realism and has little applicability to legal negotiations as it is based on simulation studies. Pruitt however, explains his “strategic choice model” where a negotiator has basically three choices: to concede unilaterally, to be competitive (by standing firm, employing pressure tactics, persuading the other party to concede and gaining advantage for yourself in expense of the other) or to be cooperative (collaborate with the counterparty and search together for jointly acceptable solutions) and analyzes the results produced from such behaviors. From examination of many studies, Pruitt (1981) draws interesting conclusions and makes propositions concerning the level of initial demands and concession rates (p.20-41) when matching or mismatching. It is important to mention that Pruitt supports concessions usually occur when the parties are similar, like each other, understand the counterparty’s’ positions and needs and are interested in their future relationship. Pruitt also discusses the stages of negotiation and points out the fact that the competitive stages are followed by coordinative stages (p.131-135).

Pruitt (1981) supports the integrative approach and this becomes obvious from the emphasis given in his book to techniques that produce reconciling solutions of the parties’ interests (p.137-200) and not just focus on winning. He also mentions the circumstances and conditions under which coordinative behavior and integrative results are more likely to occur and which factors influence this behavior. (p.105-162). He suggests for all issues to be discussed at the same time and for negotiators to have a problem-solving orientation when they interact with each other (p 165,185). He bases his findings on game theory and the prisoners’ dilemma but much of his propositions are not tested in practice. He avoids broad generalizations that is sighted in the “how to win” literature but shows the need for a link between practice and theory.

We carry on to Zartman and Berman (1982) and their book “the Practical Negotiator”. The authors present their model on the process of negotiation by examples and case studies of international political and diplomatic negotiations. Zartman and Berman (1982) used scientific studies, historical records, experiments and stimulations on the bargaining conduct as well as interviews with UN ambassadors, diplomats, and senior negotiators as evidence to create their model for effective negotiations. Their negotiation model is divided in three main stages: “the diagnostic, the formula and the details”. For each of these stages they describe the appropriate behaviors and problems. In the diagnostic stage, both parties must recognize the possibility of an outcome; the situation must be defined and it must be decided if negotiations are appropriate. In this pre-negotiation phase parties should understand the context and facts of the dispute, the perception, interests and stakes of both sides, start talks with the counterparty about the negotiability of the situation, examine the history with other party and the results of similar cases. The authors state that negotiations are appropriate if both parties recognize that joint solutions are needed to resolve a problem (p.42-66). In the formula phase, they suggest to reach an agreement on a “formula” and if this is not possible to start with an agreement on the details and create a positive environment which can lead later on to a formula. In other words, issues can be dealt separately and arrive to solutions inductively or in a deductive way by agreeing on the principles first and then on the details (p.89). Also, we observe that the authors view negotiation as a process where both cooperation and conflict are required. They propose that a successful negotiation is one that leads to creative solutions rather than concessions and discuss the personality characteristics and skills a good negotiator should have such as patience, wit, confidence and empathy. Moreover, they emphasize the significance of trust in the process of negotiation and propose ways to build the credibility of a negotiator. The impact of different cultures on negotiation, a question usually ignored by literature, is addressed as well. Although their work was from an international relations view, we have drawn many useful conclusions that are applicable to legal negotiation as well.

### 1.5 Applying New Negotiation Theories

In this chapter we will review two books Fisher's and Ury's "Getting to Yes" and Raiffa's "The Art and Science of Negotiation", which were both developed in the Harvard Negotiation Project. Although they were not the first ones to consider that other styles of negotiation exist, their work brought a new theory in the spotlight and widened the way of thinking about conflict resolution and negotiation. Fisher and Ury (1981) named their approach "principled negotiation" and Raiffa (1982) relied on game theory's term of "integrative bargaining". Both works support that the aim of negotiation is to find solutions that meet the underlying interests of the parties and expand the pie before dividing it, so as to avoid competing for the biggest portion of a limited source.

### *1.5.1 Principled negotiation vs positional bargaining*

The book "Getting to Yes" by Roger Fisher and William Ury (1981) is probably the most well-known book on negotiation. It was written in a plain and clear way to provide guidance and introduce a new way of thinking and resolving conflict. It is used as a teaching material in many legal and business courses in Universities all over the world. The most important key points mentioned in the book are summarized below.

The authors begin their book by analyzing briefly the disadvantages of the traditional and most popular method of negotiating until then, positional bargaining (Fisher & Ury at 7-10). They state that when stubbornly sticking to a position, the negotiation becomes a battle about who will win and it is less luckily that a satisfactory outcome will be produced, which will meet the true interests of the parties. They recognize that an acceptable result can be accomplished eventually after having wasted a lot of time, energy and money although it would not be a wise agreement. In p.7 the authors become the closest from all the other authors reviewed here in identifying standards for evaluating the negotiation goals prior to the specification of a behavioral agenda. They state that negotiation should be "wise, efficient, and improve or least not damage the relationship between the parties. Such a standard has its difficulties and vagueness, but at least it provides for a goal against which negotiations can be judged. Positional bargaining, as a result, fails to meet two criteria that of efficiency and that of not damaging the relationship between the parties.

They also make a distinction and subdivide positional bargaining to soft and hard. A soft negotiator is defined as a negotiator who makes concessions to avoid confrontation, gives emphasis on reaching an agreement and maintaining a good relationship with the other party. By being friendly, trustful of the other side and not having victory as a goal, is often being exploited by the other side and an aftertaste of bitterness is left. On the other hand, a hard negotiator cares only about winning and getting what they want. A hard negotiator starts by taking on an extreme position, and slowly giving in, with the logic that the longer he lasts in a locked position, the better he will benefit by exhausting the other party (contest of will). Of course when the other side is seen as an adversary, the ongoing relationship is endangered. Having explained the above characteristics, the authors conclude that a hard positional bargainer will always prevail over a soft one.

To overcome the flaws of positional bargaining, Fisher and Ury (1981) propose a new technique for resolving conflict, a method called principled negotiation or negotiation on the merits. The goal of this strategy is to accomplish a wise result efficiently, fairly and amicably. It consists of a four stage process: “separate the people from the problem, focus on interests not positions, invent options for mutual gain and insist on using objective criteria”. To these four stages they add further on a fifth stage: develop your BATNA (Best Alternative to a Negotiated Agreement), meaning finding out what is the available next choice, step or alternative if no agreement is reached with negotiation. They analyze each point with many examples, observations, recommendations and practical advices.

To be more precise, they suggest understanding the other party’s views, emotions (fears, hopes), way of thinking, their underlying interests and concerns as well as your own, so as to separate the issue in dispute from the person sitting on the opposite side of the table. The main principle is that underneath each position lies the true reason for choosing it and several possible solutions exist which could satisfy it. Also, they stress the importance of active listening in order to avoid misunderstandings and misinterpretations between the parties and point out that even when two parties have opposed positions, compatible and shared interests may exist. At this point, they recommend brainstorming for generating new creative solutions to the dispute, prior to the evaluation of each idea, in an effort to expand the pie and invent new options for mutual gain. In order to solve the substantive problem and to justify resolution on the merits, Fisher and Ury believe that objective standards and

fair procedures must be used as a basis for the solving the problem in conflict. Instead of the bottom line, which is a deadlock position of the adversarial bargaining, the authors propose the BATNA device, which is an excellent mechanism for determining if there is a point for a party to negotiate, when to walk away and to compare every proposed outcome to the BATNA outcome. When these stages were firstly introduced, they had a revolutionary impact on the lawyers' perception of how the negotiation process should be.

In the last and most recently added chapter of the book, the authors try to answer the difficult question of how to handle an adversarial negotiator and make him cooperate. They give specific advices (p.50-90) which are useful, but there is a certain take it or leave it logic behind them. In the question whether positional bargaining should ever be used, they respond that it depends on how complex is the issue of dispute, how important is to avoid future arbitration or litigation proceedings, if negotiation fails and how significant is to maintain a good relationship with the other party and still insist that the outcome of principled negotiation would be better for both parties.

This part of the book has received a lot of criticism. White (1984) in the "Pros and Cons of Getting to Yes" but also Menkel-Meadow(1983) in the "Legal Negotiation: a study of strategies in search of a theory" believe the authors are oversimplifying certain aspects and arguments and consider their approach as being naïve and self-righteous. No-one can argue that the book is not informative, or helpful, a valuable work to the evolution of science. The five stages of negotiation are a useful toolkit to any person trying to resolve a dispute. White's comment that the book "is more about how intelligent people should behave and less about the world as it is", although harsh, has a certain logic. People are not open in being wrong, they don't change their views so easily, especially when there is a lot at stake and always have an argumentation and reasoning for taking a position. Different standards of fairness do exist, elimination of contest of will and raw power is hard to accomplish and people do try to deceive or mislead you on purpose.

On the other hand, from all the books reviewed in this paper, Fisher and Ury (1981) are the ones that give the most concrete advice on how to transform a competitive and unproductive negotiation to an opportunity to solve a problem amicably. They propose a variety of smart techniques to facilitate the negotiation process and emphasize the

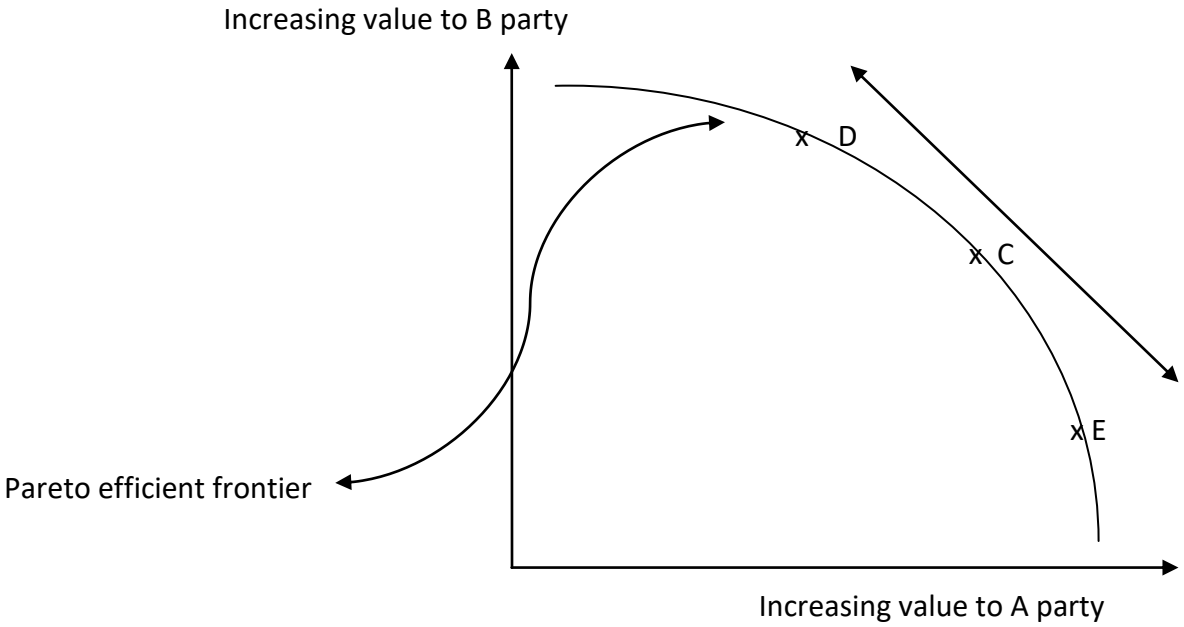
importance of cooperation, imagination, search for new solutions. Generally, they teach us valuable lessons.

In a later work of the authors and Bruce Patton (1991), with title “Getting to yes: Negotiating Agreement without Giving In”, these stages turn into “seven elements” by including also commitment and communication (initially included in the people element).

The title of Raiffa’s (1982) book “The Art and Science of Negotiation” shows his dual approach to negotiation, where he combines the Art (people puzzle and instinctive approach) and the Science through mathematical models, graphs and analysis of various case studies. He aims to widen people’s thinking about the integrative negotiation, encourage the search for creative, pie-expanding solutions such as those provided by Fisher and Ury and teach them to arrive to the most beneficial agreement by generating a win-win situation. To this end, he offers practical guidelines by using mathematical analysis of problems from the field of international relations as well as litigation and environmental cases. In his book (p.334) he combines theory and practice by applying game theory to real world cases. He claims that parties fail to reach an agreement or if they do it is not a satisfactory agreement, because they fail to analyze adequately, in depth and to their mutual advantage the issue in dispute.

Raiffa (1982) suggests the integrative approach is not applicable to all negotiations and divides negotiations in three categories: the two parties-single issue, known as zero-sum, the two parties-many issues, known as cooperative games and the many parties-many issues, known as the coalition games. The zero-sum cases cannot be resolved by the integrative process, they need competitive strategies, as there is only one issue on the negotiating table and whatever one party gets, the other must lose (p.35-48). He explains with the help of case studies and game-theory’s models that only when there are many issues involved in a dispute and parties have different values for each, trade-offs and exchanges are able to produce a variety of possible solutions along the Pareto-optimal frontier (p.133-186) and thus maximizing both parties outcomes without harming one another. His work on the cooperative games is considered to be the clearest analysis of integrative bargaining according to Mendel-Meadow (1983).

Raiffa's book goes further than discussing the cause and effect of negotiation theory as it provides an analytical approach of negotiation behavior. He argues against the linear structure of the positional bargaining mentioning its disadvantages –the target and reservation points, the small concessions, the thinking that one must lose so that the other may win. He also examines the case where third parties interveners (such as mediators, facilitators, arbitrators) are involved in the negotiation process and devotes a chapter on "Ethical and Moral Issues" (p.344-355), usually ignored by legal literature, where he explains how to deal with the issue of dishonesty and competition for individual gain.




*Picture 2.0: Pareto efficiency frontier (Lax and Sebenius, 1986; Raiffa, 1982; Watkins, 2002)*

Raiffa points out that much of the literature on negotiation suffers from trying to analyze all the aspects of this subject simultaneously and from many perspectives. Academics try at the same time to give examples and develop cases studies of what all people should do in a negotiation, they try to match their theories with the reality, examine the role of third parties and describe what rational people should do.

### *1.5.2 Problem solving vs Adversarial negotiation*

Menkel-Meadow prefers the terms problem solving and adversarial to describe the overall style of a negotiator, in contrast with the distributive and integrative approach which refers to the aim of the negotiation. In her article "Toward another View of Legal Negotiation: The Structure of Problem Solving" (1984), she analyzes the disadvantages of the traditional adversarial negotiations, describes the problem-solving model of negotiation using examples and examines the limitations of the application of the problem-solving negotiation (such as finite recourses, unequal power or wealth). She uses the terms adversarial and problem solving in a sense of the larger legal system, "the total conception of negotiation", in comparison with Schneider that uses the terms to describe certain categories of negotiation behaviors.

Also, she argues that the adversarial approach is structured upon some basic and false assumptions that affect the negotiator's behavior. The first basic assumption, on which the adversarial model is built on, is that the parties want the same things and have the same goals. It is believed that the resources are limited and scarce (zero-sum game) and division of the goods is the only solution available. Although she accepts that some parts of the negotiation can be as such, she explains that there are also better solutions closer to the Pareto optimal frontier that will not be discovered with this belief. She points out that parties do value things differently and often place value to non-monetary solutions. The second assumption replies upon Mnookin's (2010) quote: that negotiations are carried out in the "shadow of the law", meaning that lawyers are used to the court awarding logic with the binary on/off decisions (guilty-innocent, damages-injunctions) and this inhibits their imagination to create new solutions. Following the letter of the law, judges can order only certain verdicts. Menkel-Meadow (1983) believes that in negotiation we have an opportunity to be more flexible, open-minded, search for new solutions that meet the underlying interests and not be blinded to existence of other possibilities.

Moreover, she supports that it is the negotiation orientations, either adversarial or problem solving that lead to a mindset of what is achievable and thus affect the behavior of the negotiator (either competitive or cooperative) and the final result (small concessions or new solutions) . Also, in her article "Legal Negotiation: A Study of Strategies in Search of a Theory" (1983) she suggests that the first step before a negotiation is to set the goals –

purposes of the client or lawyer in the particular case and depending on them decide the strategy and behavior that best supports it. She also lists ten variables that can affect the orientations of a negotiation: «subject matter, content of the issues, voluntariness, visibility, parties' relationship, accountability, stake, power, personal characteristics of the negotiator, medium of negotiation and alternatives to negotiation". In her article "When Winning Isn't Everything: the Lawyer as Problem Solver "(2000) she emphasizes that cooperation is not synonymous to yielding and stresses the benefits of using a third party (mediator) especially in a hostile negotiation.

### *1.5.3 Distributive vs Integrative negotiation*

Lax and Sebenius (1986, 1992) in their book "The manager as a Negotiator" use the terms integrative and distributive to explain the aim of the negotiation process. A negotiator can aim to be either integrative and cooperate with the other party or distributive and compete to claim value. To explain this dilemma a negotiator faces they use the term "Negotiator's Dilemma". When creating value, the negotiator is expected to share information, act openly, cooperatively, creatively, fairly and develop win-win solutions by searching for mutual gain. It is important to meet both parties underlying interests as much as possible and increase the resources available – expand the pie. Value can be created by identifying the common interests as well as exploiting the differences. The most important differences that can add value and create a lasting and beneficial agreement, according to Lax and Sebenius (1992), are differences in the risk the parties are willing to undertake, differences in the time frame to resolve an issue and differences about their view of the future.

The distributive negotiation is the exact opposite. The parties are interested to get as much as possible out of the limited resources available, they conceal information, exaggerate, argue aggressively, take high opening positions, concede slowly and are willing to outwait the other party. The purpose in the value claiming style is to beat the other party (win). As Mayer (2000) points out "unless unlimited recourses are available, people try to get their needs met at someone else's expense". Lax and Sebenius (1986) support the integrative approach and believe in creating mutually beneficial results for both parties.

The most important point the authors make is that negotiation is a process which combines both cooperative and competitive elements, as they are linked activities. Negotiation should not always be the one or the other, the two behaviors should coexist. They argue that in a negotiation there is a time to be integrative and a time to be distributive. What they propose is to be integrative in the beginning of the negotiation, so as to increase the value of the recourses available and then be distributive and divide them, if necessary. Going straight to the distributional phase, would only be negative as a huge opportunity to expand the pie would be missed. The only problem they find in this logic, is that because of the value creating phase and the openness required for it to work, the parties would be susceptible to exploitation. For this reason, they devote a chapter of their book to protect value creating parties from the dishonesty, deception and pretending of a value-claiming party. They also provide tactics such as the "petard tactics" or the "bait and switch" to battle this problem. Apart from that, Lax and Sebenius (1992) believe that the key to building trust and avoiding misleading behaviors is repetitive encounters and dealings with the other party. To accomplish that they propose to break the negotiation in many stages, so that parties deal with each other for longer and start with less trivial issues where the risk of being misled is small, test the other party and at the same time slowly build a trusting environment. Another structural change they propose is to divide the process of negotiating into two separate and clear phases: the value-creating and the value-claiming. The last suggestion is to commit early in the negotiation to use cooperative attitudes and set the principles on which the process will be based: fairness, justice, reason, trust. Also, Lax and Sebenius (1992) emphasize the value of using a mediator to resolve a conflict and point out some advantages such as assistance in the communication between the parties, stopping of outbursts and increasing the ingenuity by proposing alternative solutions.

# 2. Empirical Evidence for the Effectiveness of Negotiation styles

It is from game theory that we get the first empirical evidence that support the supremacy of cooperative over competitive strategies. The research of Williams (1976) which is later continued in Schneider's study (2002) are the next two sources of empirical evidence apart from the Prisoner's Dilemma. I will present below in detail the research and the conclusions drawn.

## 2.1 Game Theory (Prisoner's Dilemma)

In 1950 mathematicians Merrill Flood and Melvin Dresher framed the game which later became known by Mathematician Albert W. Tucker, as Prisoner's Dilemma. Prisoner's Dilemma examines the case where two people commit a crime together. They have agreed that if caught they will not blame the other and are being arrested without the ability to communicate with the other. The police have evidence to convict both for one year, if both keep silent and stick to their initial agreement. If both prisoners betray the other, the police will now have evidence to convict them for two years. Each prisoner is also given an opportunity to testify that the other person committed the crime. If this happens the one who betrayed the other would be freed and the other serve three years in prison. The dilemma lays in whether to betray the other party in the hope of getting off completely, given that the other will not betray you too or cooperating with the other and both getting a good result.

Given that each party has two options either to defect or to cooperate; if A cooperates B should defect to go free instead of going to jail for a year. If A defects, B should defect as well, because being imprisoned for two years is better than for three years. As a result no matter what the other party does, B should defect. With the same logic, A should defect also. The interesting part is that while both parties are pursuing the best individual award (being free), by mutually defecting they get a mediocre result, which is worse than the outcome they would get if both had cooperated and kept silent. As demonstrated, cooperation yields a better outcome than competition, but is not the rational choice a

person would make who cared about his own self. To trust the other party to keep the agreement or even accept to get a good outcome when you can get the best outcome is not in the nature of humans.

Conflict researcher Robert Axelrod (1984) aimed to understand the conditions under which cooperation could emerge and which actions could be taken to develop cooperation in a specific setting. In his book “The Evolution of Cooperation” he uses a repeated version of the Prisoner’s Dilemma to show that cooperation occurs when the parties interact many times with each other. He conducted competitions with computer stimulations where the participants had knowledge of the previous move of each of the other players while playing repeatedly the game. A strategy called TIT-FOR –TAT was proven the most successful in yielding the most cooperation when applied for many rounds of the dilemma. It was this strategy that won Axelrod’s various competitions. It involved starting the game cooperatively and mimicking the previous move of other player. So, if the opponent defected in the last round, the next move was to defect as well. If the opponent cooperated, then the party should respond with cooperation. The concept is to punish the other party by defecting whenever they fail to cooperate and rewarding them with cooperation whenever they do cooperate. The choice made in one round, not only determines the outcome of that round but also influences the later choices.

After analyzing the outcomes of his top scoring strategies, Axelrod (1984) concluded that a successful strategy should have the following characteristics: be “nice”, in the sense that the first move should always be cooperate, not to defect before the other party does and to avoid unnecessary conflict. The following moves in the game should be “retaliating”, defecting when met with an uncooperative party to avoid being a victim and “forgiving” by giving opportunities to resume cooperation when the other party chooses cooperation again. Finally, an efficient strategy should be “non-envious”, meaning not wanting to prevail over the other party and “clear and simple”, so as the other parties can anticipate your responses and adapt to your pattern of actions. The TIT-FOR-TAT strategy shows how to maximize your gain when dealing with an uncooperative party and is a way to accomplish cooperation, provided that the parties encounter each other again in the future.

Axelrod's analysis of the Prisoner's Dilemma, the TIT-FOR –TAT strategy, the five characteristics for a successful strategy and the concept of responding to the other party's actions are very useful and innovative tactics. Nevertheless, Axelrod's strategy is developed in an idealistic environment and is based on certain assumptions, ignoring the complexities of the real world. In real negotiations people are able to communicate with each other and are sometimes unable to understand whether a party is truly cooperating or pretending in order to extract information about your bottom line. Certain parties may also have a reputation for cooperating or not in similar disputes and thus the parties can anticipate certain behaviors from the other side. Expressing intentions and dialogue can on the other hand reduce the uncertainty of the other parties' behavior and make competition seem an unattractive choice.

**2.2 Research Studies of Williams and Schneider**

In 1976 Williams conducted a survey in 1000 lawyers operating in Phoenix and asked them to rate the counterparty of their most recent negotiation by using three set of scales. In the first scale he asked them to rate from 0 to 5 as very characteristic a list of 75 adjectives, in the second scale he asked them to rate from 1 to 7 as highly characteristic a list of 43 bipolar pairs and in the third scale he asked them to rate a list of 12 potential objectives and goals that the negotiator had. In the end he asked them to evaluate the overall effectiveness of the negotiation from inefficient to very effective. The results of this survey are reported in his book "Legal Negotiation and Settlement" (1983). His aim was to develop a general unified theory about negotiation effectiveness. In his book, he describes negotiation from the view of the lawyer.

He used statistical theory and divided the responses into two clusters which he labeled cooperative and competitive. 73% of the negotiators were found to be cooperative and 27% competitive. From the competitive negotiators, 25% was seen as inefficient, 42% as average and 33% as ineffective. From the cooperative side, 3% were considered as inefficient, 38% as average and 59% as effective. 11% of the responses didn't fit in any of the two groups, but Williams didn't label them differently. In both cooperative and competitive styles he analyses the characteristics that make negotiation effective and ineffective.

Schneider (2000) took Williams original research of 1976', repeated his work after twenty-five years and made changes to the methodology which were reflecting the changes in the negotiation field as well as the legal profession and education. She preferred the terms problem-solving and adversarial instead of cooperative and competitive, which Williams used to label the negotiation styles. That is because she argued that although competitive has the same logic as adversarial; meaning a hard bargainer, cooperative is not equal to problem-solving or integrative bargaining. Cooperation implies a willingness to concede to get along and splitting the pie instead of enlarging it. Schneider's aim was to prove that the popular adversarial approach is less effective and riskier than the problem-solving.

In her study Schneider (2000) made the following changes in her survey. She added fourteen new adjectives, twenty bipolar pairs and two new goals, all from problem-solving literature. She also included a self-evaluating section in order to measure the ADR experience, negotiation training and general background of the respondents as well as to assess the participants own goals in negotiation and to compare them with the goals that the counterparts had. She took out questions that Williams didn't focus on and divided the scale ranges of effectiveness into three parts "effective, average, ineffective". She made, apart from the two cluster analysis Williams had performed, a three and four cluster analysis as well.

Her two cluster analysis revealed more or less the same results as Williams' for the problem-solving/ cooperative approach and showed a drop in the effectiveness of the adversarial/ competitive approach. To be exact, of the 64% problem solving negotiators that were identified, 54% were considered effective, 42% average and only 4% ineffective. On the other hand, of the 36% adversarial negotiators identified in the survey, 53% was considered ineffective, 37% average and 9% effective. In her four cluster analysis, Schneider labels attorneys as true problem-solving, cautious problem-solving, ethical adversarial and unethical adversarial. There the differences in effectiveness between each cluster became more obvious. To be more precise, of the 38.5% of true problem-solving attorneys only 1% was considered as ineffective, 27% was seen as average and 72% as effective. In the cautious problem solving cluster, belonged 27.5% of the overall negotiators with 12% being ineffective, 65% average and 24% efficient. The ethical adversarial negotiators gathered a

percentage of 21.5%, with 40% being ineffective, 44% average and 16% inefficient. From the results 12.5% of unethical adversarial 75% were considered as ineffective, 22.5% were seen as average and 2.5% as efficient.

From the efficiency ratings above, future negotiators can decide in which cluster they wish to belong, adopt the characteristics of that cluster and avoid traits of the less effective behaviors. As Williams pointed out “neither pattern has exclusive claim on effectiveness…an attorney can be very effective or very ineffective within the constraints of either. The higher proportion of cooperative attorneys who were rated effective does suggest it is more difficult to be an effective competitive negotiator than an effective cooperative”.

Generally, the study showed that the problem-solving approach and nobler values (such as honesty, dignity, and fairness) are highly more effective than the old adversarial approach. The most important traits effective negotiators had in common were to be smart, prepared and assertive. Negotiators that antagonize, misjudge, mislead and don’t care about their clients were considered as the more ineffective. In a comparison with the Williams’ study, it seems that adversarial behavior has grown in the last 25 years to be nastier and less effective, which in return increased the gap between negotiating styles.

Although both studies are unquestionably significant, there are two main problems with this and Williams’ survey. First of all, the data rely on lawyers perceptions of other lawyers and themselves, instead of observations of actual negotiations. The second issue is that the participants to the survey are voluntarily self-selected and therefore not representative of the whole population. In other words, the results of the surveys are subjective and not objective. Also, no clarification or guidelines have been given for any of the terms in the questionnaire, so as to ensure that all participants are on the same page and have the same concepts in mind (vague definition of the word “effectiveness”).

## 3. How to negotiate after all?

Having reviewed the most ground breaking literature of the last sixty years, I have gathered theoretical and empirical evidence that prove that the old adversarial style isn't the best strategy to follow when negotiating. The new problem solving method of meeting the parties underlying interests has proven to be more efficient and beneficial. As per Williams' and Schneider's study, an adversarial negotiator can be successful as well, but the closer a party comes to the characteristics of the true problem-solving negotiator (ethical, trustworthy, communicative), the higher the rate of effectiveness becomes. A negotiator must also keep in mind Fisher's and Ury's five techniques to a amicable agreement: focus on the problem, not the people, look at the underlying interests not the initial positions, search for alternative solutions for mutual gain, use objective criteria and amplify your BATNA. It is essential to keep in mind that careful preparation and "ethical" behavior (fair and just) are key elements for a successful negotiation. Axelrod's strategy to accomplish a successful outcome by being "nice" in the beginning, "retaliating" when the counterparty is being competitive, "forgiving" when it changes back to cooperation and "non-envious" is important to remember as well. Lax and Sebenius, Menkel- Meadow and Axelrod all agree that trust which is necessary for the cooperation of the parties and the creation of a friendly environment is achieved by repeated encounters. Only then can parties focus on creating value instead of only claiming it. When there are two parties and a single issue of dispute, Raiffa and Menkel-Meadow believe that zero-sum games are inevitable, as there is no bargaining space to be created or trade-offs that can enlarge the pie and lead to a problem-solving outcome.

Generally the body of theoretical and empirical literature sends mixed messages about the negotiation approaches that should be used in a conflict. The views are polarized in two main approaches, each one with specific characteristics for the negotiator and his style and specific ways to accomplish a successful outcome. I believe negotiation is not black or white and many times during a debate, negotiators' behaviors change and adapt to the behaviors and styles of the other party. In order to avoid the uncertainty, the anxiety, the fear of losing in a confrontation, academics and mostly lawyers wanted to create a general

theory about negotiation and thus it was divided in two opposing approaches. As a result, if you confront the other party as an adversary, you should argue for the largest share of pie and be a tough bargainer, but if you view the other as an ally, you should work together for the creation of new alternative solutions and be cooperative. In reality stances change fast during a negotiation and the lines are not so clear between the two behaviors. I support that a negotiation can't be only integrative, there is a phase to create value and there is a phase to claim value. By having a problem-solving approach to negotiation even in the claiming phase, parties will not be hostile and preserve or at least not destroy their relationship. I believe problem-solving is not an approach, it is a mindset, a view of the way negotiations should be conducted and if all people could adopt it, conflicts will be resolved much more amicably. It is idealistic in a competitive and rather cruel world to believe conflicts can be handled better but through teaching and learning, there is always hope for improvement and evolution of our way of thinking. The most recent theories after all show a move from the totally competitive way of thinking and the totally integrative behavior to a mixed approach of both. It is natural for all negotiations to commence in a competitive climate and slowly change to cooperation with the frequent contact.

# 4. Definition and characteristics of Mediation

At this point and before proceeding in discussing the effectiveness of negotiation approaches and their use in mediation, we must first define the term mediation, mention its types, stages advantages and disadvantages and clarify the role of the mediator. Mediation first appeared in the Ancient Greek and Roman times and evolved in the form that we know today after 1980s'. Mediation is a structured and confidential process where a neutral third party (mediator) assists two or more parties in resolving their dispute. The intermediary doesn't have adjudicatory powers and helps parties reach a decision themselves with the use of negotiation techniques. It is usually a voluntary procedure but it may be ordered by a court of law or provided by law. Parties are free to walk away at any time or end the mediation if found in a deadlock situation. The dispute through mediation is usually resolved within a day and a binding and final agreement is not guaranteed. Mediation is an alternative dispute resolution mechanism, where parties should engage in good faith to produce an amicable settlement, a win-win solution.

There are three types of mediations as regards to the relationship between mediation and court proceedings, the Private mediation (totally independent), the Court-Annexed mediation (started by the court but no other involvement) and judicial mediation (closely connected with the court system in terms of place and staff). Mediation is applicable to many areas of conflict resolution such as family, commercial, environmental or energy disputes. The style of the mediator can either be facilitative where the mediator isn't allowed to propose concrete solutions to the parties or evaluative where recommendations and legal advice can be given to the parties. Mediation has usually five stages. It starts with an introduction where the rules are established by the mediator and his opening statement. Then follows the parties' statements and a joint discussion of the issue of dispute where the parties' positions and underlying interests are identified. The mediator can use caucuses as private audiences with the parties to promote open communication, if necessary. The development of alternative solutions and examining the best one is the final stage before resulting to an agreement.

The mediator is responsible for the process, while the parties are for the outcome. His role is to facilitate communication, encourage discussion of difficult topics in a constructive way, use techniques to built a “yesable” environment, adapt and guide parties to find new paths and the optimal solution. The mediator also pushes parties to think outside of the box and to not engage in personal attacks. As Menkel-Meadow (2000) suggested, parties need the mediator as sometimes when a proposition comes from the other side, it is immediately rejected. The mediator stands as an impartial third opinion to tackle the difficulties of negotiating. It is important to note that the mediator, given certain qualifications, can be from any profession and is not obliged to be a lawyer.

The advantages of using mediation in order to resolve a conflict in comparison to other ADR mechanisms or litigation, are that it a less formal, not complicated and flexible procedure. Parties are free to decide the details of the process, best practice standards do exist but they leave a lot of freedom to the parties. Also, the parties are the ones who solve the dispute, by inventing with the help of the mediator alternative solutions. In formalized court proceedings judges can order specific solutions which are imposed on the parties. In mediation the parties have better knowledge of the subject and self determine the result which is tailor-made to their own needs and interests. Since the parties mutually agree on the solution, the quality of the result is improved and the parties have total control over the outcome (substantive justice). The final agreement holds up in time and parties are willing to comply since they participated actively in its shaping. Its duration makes it a fast and less costly way to end a dispute. Moreover, with more mediation procedures the litigation court system is lightened. Mediation helps parties maintain a good relationship as it not a position-based bargaining process. The goal is to focus on the parties underlying interests and enlarge the pie. Therefore, mediation follows an interest based approach with the priority of creating value and ensuring open communication. In mediation parties collaborate in order to construct an agreement rather than creating a winner and loser party. The whole approach is non- adversarial.

Both mediation and negotiation are processes for resolving parties conflicting interests and opposing positions. Negotiation involves dialogue with the aim of reaching an agreement. Mediation is a form of negotiation in which a third party guides the discussion and assists in the process. It is observed that mediation is more often used in cases that are

relative simple, of low tension and when the parties are of equal power. Mediation on the other hand is used when the issues in dispute are more complex or stressful and the parties' willingness to settle is doubtful.

### 4.1 Challenges that commercial Mediation faces and their connection to the integrative phase of negotiation

We must understand that negotiation is not the first option when encountering a threat or a difficult and stressful situation. According to neuroscientists, peoples' instinctive reaction is to avoid the conflict and withdraw or fight to survive (win). To negotiate is to make a conscious decision, which requires effort, education, time and preparation, to overcome the immediate response and look for other ways to manage a dispute. Also, in negotiations and mediations people are required to take responsibility and form a decision themselves, which makes them feel uncomfortable and anxious of being embarrassed or cheated. They prefer for a decision to be imposed on them by a third party (could be a judge or arbitrator) who has the knowledge and expertise and is obliged to fair, just and impartial.

Having this in mind, it is no surprise that despite the multiple advantages and benefits of mediation, less than 1% of the total EU cases are resolved through mediation. Statistics show that mediation is used mostly when forced by a court of law as a prerequisite to trial or when it is mandatory by law. The way the whole legal sector views mediation and negotiation is flawed and it is what creates this result. Lawyers although they negotiate daily in their profession, are not used to the integrative approach and the freedom that is characteristic of mediation. From law school they are taught only how to win, how to manipulate the law in their advantage and how one side must win and the other must lose. There can never be two winners. Thus, when they are involved in a negotiation or mediation (and usually lawyers are) they react in the same way as in a court room and want to defend what is theirs or even treat mediation as an unnecessary step to access the true justice system, the trial. They tend to think of negotiation in mediations as a waste of time and money. It is highly unlikely that people who have devoted their energy on "fighting" during the litigation, will switch automatically in mediation to an interest-based attitude and focus on finding the best mutual solution, all because a certain day is scheduled for mediation. In

most mediations, the discussion doesn't go further than the outcomes a court would award. As a result, negotiations and mediations occur "in the shadow of the court" and the adversarial tactics prevail. This mindset cannot be changed instantly, it takes time but also it must be encouraged, discussed and taught.

Another reason commercial mediation is harder to have a genuine integrative phase is because parties feel exposed and believe open communication can endanger their position and future outcome. In order to create joint value and alternative solutions, parties must express their needs, desires and goals. The problem is that they can be taken advantage from the other party and whatever is said in the friendly environment of negotiation can be later used against them, if no agreement is made and litigation follows. As we have established in this dissertation, the problem of dishonesty and lack of trust can be solved by having time and repeated encounters. The mediation model currently used has a standard duration of one day. Thus, not much time is available to help built a trustful environment and for parties to care to maximize their gains and the other parties' as well.

At this moment we must ask ourselves if negotiation and mediation are needed as alternative resolution methods or if we are perfectly fine just with litigation and arbitration. We have invented two methods of resolving disputes that are currently not used unless when obliged and are not preferred by the legal community. We have also established that the current mediation model amplifies the use of distributive negotiation. This is acceptable for simple disputes, but in more complex cases, where parties have future business together, the one day mediation process is not so effective.

Some believe that mediation should be conducted alongside litigation with two separate groups, one negotiating the settlement and one after the litigation, instead of mediation being an interruption from litigation that if not successful will resume at the moment stopped. Others propose to hold preliminary meetings between the parties to discuss which resources could be of value in a future settlement, without assessing them at the same time.

From the definition and characteristics of mediation, we assumed that mediation is interwoven with the integrative approach, as both aim in creating value and amicable settlements. Despite this, in practice our assumption was proven idealistic and wrong. One thing is for sure, the model of mediation currently used is not working. We have stripped

from it the possibility of making use of the most efficient methods of negotiation, its problem-solving phase and its advantage of autonomous decision making. Given these possibilities and the high efficiency rates mediation has when taken seriously, it is a pity to be stuck in stiff court orders. Research and studies need to be made in the area so that mediation can take its rightful place alongside litigation.

# Conclusion

In this dissertation I focused on the negotiation process and in the course of understanding the different styles, behaviors and approaches, I examined leading works on the subject from the legal field as well as from other disciplines (economics, political science, anthropology, psychology, game theory) of the last sixty years. I reviewed empirical studies on the effectiveness of the two main approaches on negotiation. Both theory and evidence pointed out that the integrative negotiations are likely to be more effective than the competitive ones. I supported that the use only of cooperative techniques when negotiating is not enough to achieve a satisfactory settlement. Negotiators need to be aware of aggressive techniques and for the value-claiming phase of a negotiation. Based on these, I provided guidance that could be taken into account when negotiating a dispute. I analyzed the characteristics and advantages of mediation compared to other ADR mechanisms and addressed the problem the legal community creates by treating mediation as a step within litigation and not as a separate conflict resolution mechanism. I have shown that the mediation model currently in place with the one day duration leads to adversarial negotiations and doesn't allow space or time to create a problem-solving phase. Finally, I described some ways to solve this issue and proposed that changes should be made to the mediation model so that it becomes a dynamic technique for resolving conflict, equal to litigation.

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